Commissioner of Central Excise Vs. M/S. Pithampur Alloys Casting Ltd

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-15-2012

Judge : The Honourable Ms. Justice Archana Wadhwa, Member (Judicial) &Amp; the Honourable Mr Justice Mathew John, Member (Technical)

Appeal No. : Excise Appeal Nos.1481 -1482 of 2005 & Excise Cross Objection No.03-04 of 2006

Appellant : Commissioner of Central Excise

Respondent : M/S. Pithampur Alloys Casting Ltd

Advocate for Pet/Ap. : For the Appellants: R.K. Verma, JDR. For the Respondent: None.

Judgement :

Per Archana Wadhwa (for the Bench), J.

1. Being aggrieved with the order passed by the Commissioner (Appeals), Revenue has filed the present appeal. 2. We have heard Shri R.K. Verma, learned DR. Nobody appeared for the respondents.3. As per facts on record, the respondents are engaged in the manufacture of MS ingots and cast article of iron and steel falling under Chapter 72 and 73 of the schedule to the Central Excise Tariff Act, 1985. Their factory was visited by the Preventive Central Excise officers on 25.7.96. Various checks and verifications were conducted. The stock of final product was found to be tallying with the recorded balance in RG I register.

However, some of the raw materials like scrap, ferro manganese and ferri silicon were found short to the extent of 166.758 MT, 3.920 MT and 0.050 kg respectively. A panchnama was drawn.

Scrutiny of private records resulted in recovery of two loose papers kept in a red register. The said papers were showing disposal of final product of the respondents. On comparison with RG I entries, it was found that clearances reflected in the said loose papers were not recorded.

4. Statement of Shri D.S. Trivedi, Accountant was recorded on 2.8.96 wherein he deposed that the shortage of raw materials is due to non-verification of stock of raw materials from time to time. As regards, the loose papers, he deposed that same were written by Shri P.S. Gehlot, Production Supervisor. Shri Gehlot did not appear for recording of statement in spite of summons being issued to him.

5. As the loose paper recovered from the factory revealed that the casting have been sold to one Shri Bupender Kumar, Proprietor, M/s.Sneh Sales Corporation, Indore, inquiries were conducted at the end of buyers. Shri Bupender Kumar in his statement on 5.8.96 admitted that the said goods reflected in loose papers were over and above the goods supplied to him under the cover of invoices. He clarified that the entire payment was made in cash and he has further sold the goods in cash to his customers. He admitted that during the period 27.3.96 to 27.6.96, the total receipt of Manganese Steel castings from the respondent was to the tune of 7.92 MT and 11.989 MT whereas the invoice quantity was 4.792 MT and 4.070 MT.

6. The statement of Shri Gehlot was subsequently recorded on 27.8.96 wherein he admitted clandestine clearance of a part of castings to M/s. Sneh Sales Corporation. Shri Suresh Sharma, Director of the Company also agreed with the above statement.

7. Based upon the shortages of raw materials, Revenue concluded the quantum of final product, which could have been manufactured from the same. As such, it was assessed that 170.592 MT of casting valued at Rs.44.35 lakh at the rate of Rs.26,000/- PMT can be manufactured, after allowing 5% process loss involving

Central Excise duty of Rs.6,65,309/-. Accordingly, proceedings were initiated against the respondents resulting in confirmation of demand along with confirmation of interest and imposition of penalties by the original adjudicating authority.

8. On appeal against the above order Commissioner (Appeals) confirmed the demand of duty of Rs.38,143/- in respect of clearance of Manganese casting to M/s. Sneh Sales Corporation. He accordingly reduced the penalty on the respondents to Rs. 10,000/- by observing that inasmuch as the period was prior to introduction of section 11AC of Central Excise Act, the same cannot be invoked for imposition of penalty. In addition penalty of Rs.5,000/- was imposed upon Shri Suresh Sharma, Director of the company. In respect of confirmation of demand on the basis of shortages of raw material and the hypothetical calculations of production of final product and clandestine clearances of the same, he dropped the demand by relying upon various decisions of the Tribunal. The said part of the order of Commissioner (Appeals) is impugned before the Tribunal.9. On going through the impugned order of Commissioner and the grounds of appeal, we find that the Revenue has again reiterated their stand taken before the original adjudicating authority and have submitted that inasmuch as clandestine clearance of 11.056 MT of casting stand established even from the order of Commissioner (Appeals), it is to be presumed that they are indulging in clandestine activities and shortage of raw materials should be held as having been converted into the final product, cleared clandestinely. Infact, we find that while framing the issue, the Revenue, in their memo of appeal have themselves mentioned that the raw material found short is presumed to have been used in the manufacture of final product, removed clandestinely. Apart from the so called shortages of raw materials, we find that there is no evidence on record establishing conversion of raw material into final product and clearance of final product. 10. The respondents have filed cross objection and have drawn our attention to various decisions of the Tribunal. We note that each case of clandestine removal is required to be adjudged on the basis of fact and evidence available in that particular case. No doubt for the legal principle support can be taken from precedent decision but the same is required to be applied to each and every case. In the present case, apart from the shortages, which the

appellant has disputed on the ground that the same was calculated on eye estimation and no actual weighment was conducted, we find that there is no other evidence reflecting upon the clandestine removal of huge quantity of 170.592 MT alleged by the Revenue to have been manufactured by the appellant. The said quantity arrived at by the Revenue is on the basis of inputs/ output ratio, the Revenue has itself repeatedly used the expression in their memo of appeal that the said quantities presumed to have been used in the manufacture of final product. The charges of clandestine removal cannot be established on the basis of presumptions. It needs clear evidence to establish the same. As such, we find no justification in the Revenues appeal and same are accordingly rejected along with disposal of cross objection filed by the respondents.

11. All the matters are disposed of in the above manner.

(Pronounced in the open Court on) (Archana Wadhwa) Member(Judicial)

Separate order (Mathew John) Member(Technical)

12. I have gone through the order recorded by Ld. Member (Judicial), the case records, the appeal memorandum and the cross-objection filed by the Respondents. Since I am not in agreement with the order recorded by Member (Judicial), I am recording this separate order.

13. The facts of the case are already recorded by Member (Judicial). I would like to add one more piece of evidence which is not recorded in the above order. This is recorded in page 3 and 4 of the adjudication order which does not have paragraph numbers. This is reproduced below for convenience.

“Further on scrutiny of their seized records one letter No. S/96/278 dated 6.2.96 was found kept in the Bank file of Noticee No.1 annexed with the panchnama dated 2.8.96. The said letter was issued by Chief Manager of State Bank of India to the Noticee No.1 in connection with the non-submission of renewal/financial data and stock statement for the months of May-June 1996. The relevant para is as under:-

“When our field staff along with Zonal office functionaries visited the factory on 5th July,19 96, they found no stocks of raw material and finished goods i.e. scraps, iron sponge ingots. This clearly shows that the material obtained under the banks have been sold after converting them into finished goods but the sale proceeds have not been deposited in the account.”

14. I am recording the facts again for a better appreciation of the case. This is a case of alleged clandestine manufacture and clearance of excisable goods on the basis of the following evidences:

(i) Shortage of physical stock of raw material as compared to accounted stock on the date of surprise verification;

(ii) Certain loose sheets of paper recovered from the factory; The Accountant of the factory stated initially that it was written by Shri. P. S. Gehlot, Production supervisor;

(iii) Unwillingness on the part of Shri. Gehlot to join investigation initially; He joined proceedings later and stated that the loose sheets were not written by him; but he admitted that some of the goods cleared to one of the buyers namely, Sneh Sales Corporation were cleared without payment of duty and the said fact was confirmed by the Director of the company.

(iv) Admission by Sneh Sales Corporation that they received certain goods which were not covered under invoices and they paid sale value of such goods in cash;

(v) Report from the Chief Manager of State Bank of India addressed to the Respondent seized from the files of the Respondent stating that they were not depositing sale proceeds in banks.

15. At this stage unaccounted clearance of final products to M/s Sneh Sales Corporation is not being challenged. The challenge is in respect of the rest of demand calculated based on the argument that goods manufactured out of the missing raw materials also were cleared clandestinely without payment of duty. The argument of the appellants is that this part of demand is based on assumptions and presumption because there is no proof of clearance of such

goods. A further issue is that Revenue has used the word presumed about such balance clearance in the Appeal Memorandum and there can be no demand of duty based on presumption.

16. In the first place I do not agree with the argument that a case has to be decided based on a word or sentence used in the appeal memorandum or during the argument. After all English is still a foreign language to most Indians and the departmental officers are not legal pundits. I am of the view that the case has to be decided on the basis of facts of the case and the depending on the answer to the question whether the charge is proved on the basis of evidence available. Further it is seen that the word presume is not blasphemous to the scripture of law as seen from the decision of the Apex Court in the case of State Of West Bengal Vs Mir Mohammad Omar and Ors reported at 2000 (8) SCC 382. In this case while reversing the finding of a High Court and giving a higher punishment to the accused in a murder case the Court observed as under:

“In this case, when prosecution succeeded in establishing the afore narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”

17. In my view the evidence, in the case under consideration, as stated above clearly proves that the Respondent indulges in unaccounted manufacture and clearances. The position that there was shortage of raw materials was accepted at

the time of verification though later there is an attempt to retract from the admission based on the argument that stock was taken based on eye-estimation. From Panchnama dated 02-08-96 what I find is that the physical stock available was found out by loading the goods on truck No. MPO-3211 and CII-1711 and weighing. Weighment slips recorded at Maheshari Alloy Casting Pvt. Ltd. are enclosed to the panchnama. Thus I see the submission on this count to be false and an attempt to fit the facts of case into case-laws rather than seeing whether the case laws fit into the facts of the case. Further during the initial statements of Shri Suresh Sharma Director of the noticee company on 27-08-96 admitted the facts of clandestine manufacture and clearance rather than challenge the accuracy of stock taking.

18. The private records recovered from the factory prove clandestine manufacture of the goods. Further, in respect of one buyer Revenue has been able to prove the goods were actually sold to them without payment of duty. In my view these facts seen together proves the case of Revenue based on preponderance of evidence. This case cannot be considered as one based on just assumptions and presumptions. It is not necessary that Revenue has to identify each and every buyer of the final product and establish the case in each and every case. In this context the following decisions which explains the standard of proof required in such cases need to be taken into account:

(i) CCE Vs. International Cylinders Pvt. Ltd 2010 (255) ELT 68 (H.P.)

(ii) D. Bhoormull, 1983 (13) ELT 1546 (SC), Paras 30,31

(iii) Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Indore as reported in AIR 1973 SC 2266 also at (1973) 90 ITR 271 (SC),

(iv) T. Shankar Prasad Vs. State of Andhra Pradesh as reported in 2004 (164) E.L.T. 143 (S.C.), Paras 11 to 15.

(v) Maharashtra State Board of Secondary and Higher Education Vs K.S. Gandhi and Ors (1991) 2 SCC 716, Para 37.

19. Therefore I do not agree with the finding of the Commissioner of Central Excise that the case of non-duty paid clearance is proved only in respect of the goods sold in unaccounted manner to M/s Sneh Sales Corporation and not to other buyers. I find merit in the argument of Revenue and hold that clandestine manufacture is proved by Revenue in respect of the entire demand confirmed by the adjudicating authority that is for Rs. 6,65,309/-. Penalty also need to decided on the basis such quantum of duty evasion.

(Mathew John) Member (Technical) POINTS OF DIFFERENCE OF OPINIOIN

20. The facts and circumstances of the case,-

Whether the case of clandestine removal made out by Revenue is to dropped in respect of the quantities for which Commissioner (Appeal) has given relief?

OR Whether the case of clandestine removal made out by Revenue is to be upheld in respect of all the goods for which the adjudicating authority had confirmed the duty demand and penalty also to be imposed accordingly.

(Pronounced on_15/5/2012)

(Archana Wadhwa)

Member (Judicial)

(Mathew John)

Member (Technical)

21. The Registry is directed to place the matter before the Hon. President of CESTAT for resolving the above difference in opinion between Members.